NO. 35621-0-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON

Respondent,

v.

RODNEY A. WILSON,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF GRAYS HARBOR COUNTY

Before the Honorable F. Mark McCauley, Judge
and the Honorable David Foscue, Judge

OPENING BRIEF OF APPELLANT

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PM 8/24/07

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying appellant Rodney Wilson's motion to suppress evidence seized from his motel room and seized in a search incident to arrest on April 18, 2006.

2. The trial court erred in finding exigent circumstances justifying the failure of police to comply with the "knock and announce" requirements of RCW 10.31.040.

3. The trial court erred by entering the following Findings of Fact pertaining to the CrR 3.6 hearing regarding the "knock and announce" requirements of RCW 10.31.040:

> **3.**
>
> Fritts observed the defendant come out of the trailer on the premises and walk toward the blue vehicle. Fritts called to the defendant and then contacted him. The defendant was told that he was going to be handcuffed and detained for investigative purposes. The defendant swung around, struck Fritts in the face and then fled on foot.
>
> **4.**
>
> Deputy Crawford arrived shortly thereafter with his tracking dog. Crawford tracked the defendant into the woods near the residence. At one point, Crawford called to the defendant telling him to surrender or that he would send the dog after him. The defendant called back "send the dog and I'll f---ing shoot him". The defendant then fled and was not captured that day.
>
> **7.**

> The officers obtained a pass key from the landlord. Three officers went to the front door, two went to the rear window. Officers went to the door and unlocked it. Simultaneously, as they opened the door, they announced "police". The defendant was found at the door and placed under arrest. He and another individual inside, Tina Arington, were taken out of the room. The room was later secured for later search with a warrant.
>
> **8.**
>
> The defendant was searched incident to arrest. Drug paraphernalia and drugs were seized from his person. Also seized was a credit card belonging to Joanne Clark, the victim of the reported burglary.

4. The trial court erred by entering the following Conclusions of Law pertaining to the hearing regarding the existence of exigent circumstances:

> **2.**
>
> Exigent circumstances warranted the waiver of the requirements of RCW 10.31.040 in that the officers had a genuine and articulable concern for their welfare based upon the assault by the defendant, threats made by the defendant to shoot the police dog, and the nature of the prior burglaries. The concerns of the officers were reasonable and well founded.

5. The trial court's failure to suppress evidence seized during the execution of a search warrant issued in reliance upon a declaration that contained a misstatement of fact violated the appellant's right to privacy

under Washington Constitution, Article I, § 7 and United States Constitution, Fourth Amendment.

6. The trial court's failure to order a *Franks* hearing after the defense met its burden of proving a material falsehood in the search warrant declaration violated the appellant's right to privacy under Washington Constitution, Article I, § 7 and United States Constitution, Fourth Amendment.

7. The court erred in denying the appellant's motion to sever the charges stemming from April 13, 2006 (counts 1, 2, ands 3) from the charges alleged to have occurred at the time of the appellant's arrest on April 18, 2006 (counts 4, 5, and 6).

8. The cumulative error of the acts of law enforcement and errors committed by the trial court prejudiced the appellant and materially affected the outcome at the trial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was the failure of law enforcement to comply with the "knock and announce" rule when entering the appellant's motel room justified by exigent circumstances where the appellant was alleged to have assaulted an officer attempting to take him into custody by hitting him on the head, and had allegedly threatened to shoot a dog tracking him, where weapons

allegedly taken by the appellant in a burglary on April 13, 2006 were recovered shortly thereafter, and where there was no indication that the appellant was armed at the time of the alleged assault or in immediate flight therefrom? Assignments of Error No. 1, 2, 3, and 4.

2. Does the trial court's failure to suppress evidence seized during the execution of a search warrant issued in reliance upon a declaration that contains a material mistake of fact that contained a statement that a witness saw the license number of a blue Toyota Celica at the scene of a burglary, where a witness saw a blue Toyota Celica at the scene, but did not see the car's plate number, violate the appellant's right to privacy under Washington Constitution, Article I, § 7 and United States Constitution, Fourth Amendment? Assignment of Error No. 5.

3. Does a trial court's failure to order a *Franks* hearing after an appellant meets his burden of proving material falsehoods in the search warrant affidavit violate the appellant's right to privacy under Washington Constitution, Article 1, § 7 and United States Constitution, Fourth Amendment? Assignment of Error No. 6.

4. Did the trial court err in denying the defense motion to sever and thereby allowing the jury to unfairly cumulate the evidence against the appellant and improperly infer a criminal disposition? Assignment of Error

No. 7.

5. Did the cumulative errors deny the appellant a fair trial? Assignment of Error No. 8.

C. STATEMENT OF THE CASE

1. Procedural history:

A jury convicted Rodney Wilson on October 11, 2006, of residential burglary, possession of a stolen firearm, third degree assault, two counts of second degree possession of stolen property, and possession of methamphetamine following a two day trial. Clerk's Papers [CP] 195, 196, 197, 198, 199, 200.

The State filed an amended information in Grays Harbor County Superior Court on May 22, 2006. CP 13-15. Following a hearing on October 9, 2006, Wilson was permitted to represent himself at trial. Pretrial RP at 18. Wilson was appointed standby counsel. Pretrial RP at 18. CP 136-140.

The matter was tried to a jury on October 10 and 11, 2006, Judge F. Mark McCauley presiding. Following conviction, Judge McCauley imposed a standard range sentence of 84 months for count 1, 90 months for count 2, 60 months for count 3, 29 months for count 4, 29 months for count 5, and 24 months for count 6, to be served concurrently. CP 252.

Timely notice of this appeal followed. CP 257.

2. Substantive facts:

a. April 13, 2006, Gow residence at 8 Riverview Drive, Humptulips.

Police responded to report of a burglary at a residence at 8 Riverview Drive in Humptulips, Washington on April 13, 2006. 2Report of Proceedings [RP] at 45.[1] John Gow, owner of the house, reported that a DVD and VCR player, binoculars, two cameras, and five firearms were taken from his house. 2RP at 45, 47, 52, 55, 58-59, 68. A breathing machine for Gow's son, who suffers from sleep apnea, and a briefcase containing his son's records from Washington State University, was also missing. 2RP at 55, 57, 58.

A neighbor, Chris Cain, reported that he saw a blue Toyota Celica with a spoiler and flip up headlights at Gow's house on April 13, 2006. RP at 47, 61, 62.

Mary Gillingham testified that she and her husband gave a car pictured in Identifications 34 and 35 to Wilson in January, 2006. 2RP at 85, 86, 87. She testified that Wilson was driving the car the last time she saw it,

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[1] The record consists of four volumes.
Pretrial RP April 19, 2006, May 1, 2006, May 8, 2006, May 22, 2006, August 14, 2006, August 21, 2006, September 18, 2006, and September 28, 2006.
1RP June 5, 2006, October 6, 9, and 10, 2006 Pretrial hearings.
2RP October 10, 2006 Jury trial.
3RP October 11, 12, 30, 2006 Jury trial.

which was in March, 2006. 2RP at 86. Grays Harbor County Deputy Sheriff Paul Fritts testified that Identifications 34 and 35 depicted a blue Toyota Celica he observed at 35 Leonard Road on April 13, 2006. 2RP at 71. The photos were entered as Exhibits 34 and 35. 2RP at 158.

b. April 13, 2006, 35 Leonard Road, Hoquiam.

Jennifer Morgan testified that Wilson drove up to Bud Rowe's trailer at 35 Leonard Road on April 13 and asked if Rowe was there. 2RP at 117, 118. Rowe was not at home, but Morgan told Wilson he could come into the trailer and wait for him. 2RP at 119. She stated that when he was inside the trailer, Wilson asked if anyone wanted to buy some guns. 2RP at 119. Morgan identified the car Wilson was driving as a "little blue hatchback" and stated that it was the car depicted in Identification No. 35. 2RP at 119. Morgan left the room and went down the hallway, and stated that when she came back, there were guns "on the floor in the living room." 2RP at 120. She said that police arrived at the residence approximately twenty minutes later. 2RP at 120.

Sara McClaugherty stated that on April 13 she lived at Rowe's trailer. 2RP at 123. McClaugherty said that Wilson pulled up in a blue Toyota Celica and went into the house. 2RP at 124. She testified that she went to the bathroom, and when she "came out of the bathroom, there was guns

sitting in the front room." 2RP at 125. She did not see Wilson bring guns into the house. 2RP at 126.

Colleen Hicks said she was at Rowe's house on April 13, and that Wilson drove up in a Celica. 3RP at 168-69. She stated that Identifications 34 and 35 depicted the car that Wilson was driving. 3RP at 169. She stated that Wilson asked if anyone wanted to buy some firearms. 3RP at 170. She stated that she and Jason Shahan asked to see the guns, and Wilson went out to the car and brought them into the house. 3RP at 170, 171. When the police arrived she tried to hide the guns. 3RP at 172.

Deputy Fritts received a report of a burglary at Gow's house on April 13 and thought that he recognized the blue Toyota Celica described by Chris Cain. 2RP at 70. Fritts went to 35 Leonard Road where he had previously seen a vehicle matching that description. 2RP at 71. Fritts arrived at the trailer at 35 Leonard Road at approximately 12:30 p.m. and saw a late 1980s blue Toyota Celica parked in the driveway. 2RP at 70, 71. Fritts testified that after he parked his vehicle he saw a man he later identified as Wilson walking out of the trailer. 2RP at 72, 79. The man identified himself to Fritts as Roger Wilson. 2RP at 74. Fritts informed the man that he was investigating a burglary and that he was going to handcuff him. 2RP at 74. As he was being handcuffed, the man pulled free, ran north on Leonard Road,

turned left and ran into a field and then ran into the tree line. 2RP at 75. Fritts testified that as the man broke free, he hit Fritts on his forehead and shoulder. 2RP at 76, 77.

Police subsequently obtained a search warrant for the trailer. 2RP at 80, 97. Don Kolilis, a detective with the Grays Harbor County Sheriff's Department, searched the trailer and found exhibits 4, 5, 6 and 7[2] behind the cushions of a couch. 2RP at 98-100, 111. He also searched the Toyota Celica. 2RP at 100. In the car he found what he described as a "pry bar," binoculars, part of a CPAP breathing device, a briefcase containing a DVD player and paperwork pertaining to Eric Gow, whom Kolilis identified as "Mr. Gow's son." 2RP at 101, 102.

Det. Kolilis testified that he provided information for probable cause for a search warrant to Andrea Vingo. 2RP at 113-14. He acknowledged that Vingo's declaration states that Gow noticed a 1980s Toyota Celica with a spoiler leave the area of Gow's residence, and that the car's license plate number was132 MBL. 2RP at 114. Det. Kolilis testified that he was told that it was Gow, not Chris Cain, who had seen the Celica. 2RP at 114. He stated that he was not told about Cain, stating "I don't know why I wasn't told about

[2] The List of Exhibits describes these as a rifle and case, a .16 gauge shotgun, a .410 shotgun, and a .12 gauge shotgun. CP 191.

Chris, but I was told that Mr. Gow was the one who identified it, and what I was told is that it matched the description that was given there, and I believe I had given Ms. Vingo the full description of the vehicle and so she just placed the full description in instead of just placing the information that Mr. Gow had given." 2RP at 114. Wilson asked Det. Kolilis about the license plate of the vehicle seen at the Gow residence:

> Q: Did you know that license plate number of that car was not given by Mr. Gow or Mr. Cain?
>
> A: Yes, I knew that.
>
> Q: But you added it into your report, saying that (as read): John Gow witnessed this vehicle with the license plate number 132 MBL leave from the area of his residence when he arrived home that morning?
>
> A. No, I did not. Ms. Vingo added that. I had given her on the fact sheet of the affidavit of probable cause the full description of the vehicle because we're required to give the full description of the vehicle in order to obtain a search warrant so we search the right premises or vehicle, and I believe what happened, she jut took that full information and pasted it in this.
>
> Q. But the full description of the vehicle wasn't given at the time from the witness.
>
> A. Correct.

2RP at 115.

Grays Harbor County Deputy Robert Crawford testified that he was dispatched to 35 Leonard Road on April 13, 2006, in order to use a dog to track a suspect who had fled from Fritts. 2RP at 90. Crawford took a dog—Gizmo—to the scene. The dog, he said, began tracking on an "active scent."

2RP at 91. The dog tracked into the wood line, through heavy underbrush, and then dropped down a ridge into a gully. 2RP at 91. At that point Crawford saw someone downhill from him. 2RP at 91. Crawford identified Wilson in court as the man he saw in the woods on April 13. 2RP at 92. Crawford said that he announced he was from the sheriff's department and that he was sending in the dog unless the man stopped. He stated that the man responded "You send your dog and I'll fucking shoot him." 2RP at 92. Crawford did not send Gizmo into the brush and the suspect was not apprehended. 2RP at 92.

a. April 8 to April 18, 2006, Clark residence, East Hoquiam Road.

Ted Aspen reported that his car—a 1991 Chevrolet Caprice—was missing from his house, located at 2943 East Hoquiam Road, approximately a mile from the Leonard Road. 2RP at 130, 131,134. The house had been burglarized, and credit cards belonging to his late mother, Joanne P. R. Clark, and his late stepfather were missing. 2RP at 130. Aspen said the credit cards were in his mother's purse, which was in the living room of the house. 2RP at 135. The last time Aspen drove the car was April 8. 2RP at 137. He was not at the house on April 13. 2RP at 136.

Geneva McFall testified that the Caprice was not in the driveway of

the Clark house on April 14. 2RP at 140. She initially testified that she did not notice whether it was there on April 13, but testified that it was not there the afternoon of Thursday, April 13. 2RP at 142. The car was reported missing to the police on April 18. 2RP at 143.

d. April 18, 2006, Cranberry Motel, Westport.

On April 18, 2006, Deputy Kevin Schrader received information from the manager of the Cranberry Motel in Westport that Wilson was staying in room 21. 2RP at 149. The manager informed Schrader that he had seen Wilson driving a white Chevrolet Caprice that was parked in front of room 21. 3RP at 178. Police ran the license plate on the vehicle parked in front of unit 21 and determined that the registered owner—Ted Aspen—had been burglarized. 3RP at 179. Using a key supplied by the motel manager, police entered the room on April 18 and Wilson was placed under arrest. 3RP at 180, 181. When searched, police found two gas cards, three hypodermic needles, one of which contained suspected methamphetamine, and a baggie containing suspected methamphetamine. 3RP at 187-89. The liquid in the needle was determined to contain a water solution of methamphetamine. 3RP at 199, 204. The baggie found on the floor of the motel room was found to contain methamphetamine. 3RP at 204, 205.

e. Motion to sever counts for separate trial.

Wilson moved to sever counts 1, 2, and 3 from counts 4, 5, and 6 in a motion filed August 22, 2006. CP 35-39. The motion was heard by Judge David Foscue on September 28, who denied the motion. Pretrial RP at 64. The court stated some aspects of the arrest at the motel in Westport may be relevant to aspects of charges that arose on April 13, and that aspects of the incidents up to the 13th and beyond may be admissible and relevant to the arrest on April 18. Pretrial RP at 64.

f. Motion to dismiss pursuant to CrR 3.3

Wilson moved dismiss the case pursuant to CrR 3.3, arguing that his right to speedy trial was violated. The State responded that Wilson was brought to trial in a timely manner and that under CrR 3.3(c)(2)(vii), the disqualification of the defense attorney or prosecuting attorney will reset the speedy trial commencement date to zero, with the date of the disqualification being the first date of the new period. In this case, attorney Harold Karlsvick was initially appointed to represent Wilson. David Hatch was appointed on May 1, 2006 and Karlsvick was allowed to withdraw at Wilson's request. The commencement date at that time was May 3—14 days following Wilson's first appearance on April 19. Wilson was arraigned on May 8. An order for a competency evaluation at Western State was signed by

the court on June 5, tolling the time for trial. Wilson was found to be competent to stand trial on August 7, 2006. Wilson asked to be able to proceed *pro se*. David Hatch was permitted to withdraw on August 14, 2006, and Bill Morgan was appointed. Pretrial RP at 9, 13. A new commencement date was set, and the trial date was set for August 29, 2006. Pretrial RP at 18.

The motion to dismiss was heard by Judge McCauley on October 6, who denied the motion. Pretrial RP at 5. CP 135.

g. First suppression hearing (RCW 10.31.040).

Wilson moved to suppress evidence seized on April 18, 2006 by law enforcement during the arrest at the Cranberry Motel, arguing an absence of exigent circumstances to justify non-compliance with RCW 10.31.040. The matter came on for hearing before Judge Foscue on September 28, 2006. Pretrial RP at 26-58.

Deputy Fritts testified regarding the burglary at Gow's house on April 13, 2006 and the report he received of the blue Toyota Celica seen leaving the house. Pretrial RP at 27-28. Fritts went to 35 Leonard Road, where he had previously seen a vehicle similar to the description provided by the witness at the Gow house. Pretrial RP at 28. At Rowe's trailer on the Leonard Road he

found a car matching the description given, and shortly thereafter saw a man leaving the trailer. Pretrial RP at 29. Fritts testified that he attempted to place the man under arrest, but he swung around and hit Fritts on the side of his head. Pretrial RP at 30. The man then ran down the road and into the tree line. Pretrial RP at 30. Firearms alleged to have been stolen from the Gow house were subsequently recovered in the trailer during the execution of a search warrant. Pretrial RP at 30.

Deputy Crawford testified that he tracked the man into the woods using a dog, and that the man threatened to shoot the dog when Crawford announced that he was going to send the dog after him unless he stopped. Pretrial RP at 38. Crawford and Fritts identified the man at Leonard Road as Wilson.

Kevin Schrader testified that police had "received information that [Wilson] was possibly armed" and that "he was threatening to shoot police if we came after him." Pretrial RP at 48.

Judge Foscue held that exigent circumstances existed in the case and denied the motion to suppress. Pretrial RP at 58-59. The following findings of fact and conclusions of law were entered October 2, 2006:

FINDINGS OF FACT

1.

On April 13, 2006, there was a burglary of the Gow residence located at 8 Riverview Drive, Humptulips. Numerous firearms were stolen. The witness gave a vehicle description for the suspect vehicle as a blue 1980's Toyota Celica with a spoiler and flip-up headlights.

2.

Deputy Fritts of the Grays Harbor County Sheriff's Department received information of the burglary. He also thought he recognized the motor vehicle as described. Fritts went to 35 Leonard Road where he located a vehicle matching that description.

3.

Fritts observed the defendant come out of the trailer on the premises and walk toward the blue vehicle. Fritts called to the defendant and then contacted him. The defendant was told that he was going to be handcuffed and detained for investigative purposes. The defendant swung around, struck Fritts in the face and then fled on foot.

4.

Deputy Crawford arrived shortly thereafter with his tracking dog. Crawford tracked the defendant into the woods near the residence. At one point, Crawford called to the defendant telling him to surrender or that he would send the dog after him. The defendant called back "send the dog and I'll f---ing shoot him". The defendant then fled and was not captured that day.

5.

On April 17, 2006, Deputy Schrader received preliminary information that the defendant was in the Westport area. On the morning of April 18th, he confirmed with the landlord of the Cranberry Motel that the defendant

was staying in Unit No. 21 of the Cranberry Motel. The defendant was identified by photograph shown to the landlord.

6.

The landlord informed Schrader that he had seen the defendant driving a white Chevrolet Caprice that was parked in front of Unit No. 21. Deputies were informed of a burglary that occurred at the Clerk residence that had been reported on April 18, 2006. Among the items taken was a Caprice motor vehicle. Officers ran the license plate on the vehicle parked in front of Unit No. 21. The registered owner was found to be the victim of the burglary.

7.

The officers obtained a pass key from the landlord. Three officers went to the front door, two went to the rear window. Officers went to the door and unlocked it. Simultaneously, as they opened the door, they announced "police". The defendant was found at the door and placed under arrest. He and another individual inside, Tina Arington, were taken out of the room. The room was later secured for later search with a warrant.

8.

The defendant was searched incident to arrest. Drug paraphernalia and drugs were seized from his person. Also seized was a credit card belonging to Joanne Clark, the victim of the reported burglary.

Based upon the foregoing findings of fact, the court enters the following:

CONCLUSIONS OF LAW

1.

The court has jurisdiction over the parties and subject matter herein.

2.

Exigent circumstances warranted the waiver of the requirements of RCW 10.31.040 in that the officers had a genuine and articulable concern for their welfare based upon the assault by the defendant, threats made by the defendant to shoot the police dog, and the nature of the prior burglaries. The concerns of the officers were reasonable and well founded.

ORDER

IT IS THEREFORE ORDERED that the motion to suppress is denied.

CP 126-28. Appendix A.

h. Second suppression motion based on an alleged material misstatement in a search warrant affidavit for warrant to search the Leonard Road trailer and the Toyota Celica.

On the second day of trial Wilson moved for suppression of evidence obtained by law enforcement from the Leonard Road trailer and the Toyota Celica on April 13, 2006. 3RP at 161-165. The court found that motion was not timely and did hear the issue. RP at 163-65.

i. Jury instructions.

Wilson objected to the elements pertaining to count 1 (first degree burglary) as given, arguing that there was no evidence supporting the

allegation that he was armed at the time of the offense.[3] 3RP at 225-28.

j. Verdict.

The jury found Wilson guilty of residential burglary, possession of a stolen firearm, third degree assault, two counts of possession of stolen property, and possession of methamphetamine. CP 195, 196, 197, 198, 199, and 200.

k. Motion for Arrest of Judgment to Dismiss count 1 and to suppress evidence obtained as a result of the search of the Leonard Road trailer and Toyota Celica.

Wilson filed a Motion for Arrest of Judgment on October 23, 2006 and affidavit in support of the motion. CP 201-202, 203-208. Wilson argued (1) that there was insufficient evidence to prove that he committed burglary and (2) that affidavit of probable cause to obtain a warrant to search Rowe's trailer at 35 Leonard Road and the Celica contained a false statement.

The declaration for Search warrant, prepared by Andrea Vingo, requests a warrant to search the residence at 35 Leonard Road and a 1980s blue Toyota Celica. The declaration states in relevant part:

> Mr. Gow noticed a 1980's blue Toyota Celica with a spoiler and Washington license 132 MBL, leave from the area of his residence when he arrived home that morning.

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[3] The jury ultimately acquitted Wilson of first degree burglary, but convicted him of the lesser included offense of residential burglary. CP 200.

CP 219-20.

In its response to the motion, the State conceded that it was Cain who saw the vehicle pull away from Gow's house on April 13, not Gow. The State also conceded that the license plate number was obtained from the vehicle located by police at 35 Leonard Road, and was not seen by Cain or Gow. CP 216.

The State argued that the information is "incorrect" but "not 'false' in light of what actually happened." CP 216. The State also argued that it was not a knowing or intentional falsehood or made with reckless disregard for the truth. CP 216-17. The State filed a Declaration of Don Kolilis stating that he realizes "now that Deputy Fritts obtained the license number for the vehicle, not from Mr. Gow, but from the fact that the vehicle was parked at the 35 Leonard Road residence." CP 227-28.

The court t heard argument on the motions on October 30, prior to sentencing. 3RP at 252-56. Judge McCauley found that the State presented sufficient evidence to convict Wilson of residential burglary. 3RP at 253. The court denied the motion, finding that "there were some mistakes." The court found that the mistakes

were negligent mistakes or innocent mistakes in that when

> information was being conveyed by telephone in a quick fashion to try to pull together the information for the search warrant, some inaccuracies turned up in the affidavit of the prosecutor. However, the gist of the whole story was basically correct and they certainly weren't the type of intentional or malicious statements that would warrant suppression under the facts and circumstances of this case.

3RP at 256.

An order denying the motion to suppress was entered October 30. CP 133.

3. Sentencing:

The case came on for sentencing on October 30, 2006. 3RP at 252. Wilson was given an opportunity for allocution. 3RP at 258. The court sentenced Wilson to a standard range sentence of 84 months for count 1, 90 months for count 2, 60 months for count 3, 29 months for count 4, 29 months for count 5, and 24 months for count 6, to be served concurrently. 3RP at 263.

D. ARGUMENT

1. EVIDENCE SEIZED DURING THE SEARCH OF WILSON'S ROOM AT THE CRANBERRY MOTEL SHOULD HAVE BEEN SUPPRESSED BECAUSE OF THE FAILURE BY POLICE TO COMPLY WITH THE KNOCK AND ANNOUNCE RULE WAS NOT JUSTIFIED BY EXIGENT CIRCUMSTANCES.

Wilson challenged the failure of law enforcement to comply with the

provisions of RCW 10.31.040 during entry into his room at the Cranberry Motel in the absence of exigent circumstances. Wilson argues that when executing the warrant and forcibly entering Wilson's room, the police failed to comply with the "knock and announce" rule and that the trial court erred failing to suppress all evidence seized as a result of the entry.

The motion was heard by Judge Foscue on September 28, 2006. Pretrial RP 22-59. The State presented the testimony of Fritts, who described the burglary at Gow's house in Humptulips in which firearms were taken. Pretrial RP at 28. Fritts testified that based on the report of a Toyota that was seen at the scene of the Gow burglary, he went to 35 Leonard Road and found a car that matched the description of the car given by the witness to the Gow burglary. Pretrial RP at 28. After arriving at Leonard Road, Fritts found a man he identified as Wilson and attempted to place him under arrest. Pretrial RP at 29-30. Fritts testified that as he grabbed the man's arm, the man "immediately swung around and punched me in the side of the head." Pretrial RP at 30. The man then pulled away and ran down Leonard Road. Pretrial RP 30. The missing Gow firearms were recovered from the trailer at 35 Leonard Road. Pretrial RP at 30.

A tracking dog named Gizmo was brought to the area where the man was seen the dog "indicated on a scent trail." Pretrial RP at 37. A man was

seen in the woods by Deputy Crawford approximately a quarter to a half mile from the trailer. Pretrial RP at 37. Crawford yelled for the man to stop or he would send in the dog. Pretrial RP at 38. He testified that the man responded "send the dog and I will fucking shoot him." Pretrial RP at 38. The man was not caught. Pretrial RP at 38.

On April 17 police received a report that Wilson was "in the Westport area" and that "he was armed and threatened to shoot an officer if the came after him." Pretrial RP at 42. On April 18 police learned that Wilson may be at the Cranberry Motel in Westport. Pretrial RP at 44. The hotel manager had a Rodney Stevens registered in room 21. Pretrial RP at 44. The manger told police he had seen Rodney Stevens walking from a white Chevrolet Caprice to room 21. Pretrial RP at 44. Police observed the Cranberry Motel from the Surf Spray Motel, located across the street. Pretrial RP at 45. Police learned that a white Chevrolet Caprice was missing from a house on the East Hoquiam Road. Pretrial RP at 46. The plates on the Caprice at the Cranberry Motel matched the missing car. Pretrial RP at 46. Using a key, police entered room 21. Pretrial RP at 48. Deputy Schrader testified that "as we opened the door we announced police and went inside . . . ." Pretrial RP at 48. He said this was done simultaneously with opening the door. Pretrial RP at 48. Schrader stated that the announcement was made

without waiting was because police

> had already received information that he was possibly armed. He had already threatened to shoot a police dog, and thought intelligence, we learned that he was threatening to shoot police if we came after him. He assaulted another deputy and had committed a burglary in which guns were taken. So, there was a strong belief that he may be armed and may take aggressive action toward us.

Pretrial RP at 48.

> The court found that there were exigent circumstances, finding that (1) the officers had a genuine and articulable concern for their welfare based upon the assault by the defendant, (2) Threats made by the defendant to shoot the police dog, and (3) the nature of the prior burglaries. The court found that concerns of the officers were reasonable and well founded.

CP at 127-28.

However, these factual findings do not support a finding of exigent circumstances. *See, State v. Dugger*, 12 Wn. App. 74, 81, 528 P.2d 274 (1973) (finding of exigent circumstances in knock and announce situation may not be sustained unless the evidence which the judge finds credible is constitutionally sufficient).

Washington's knock and announce statute, RCW 10.31.040, provides:

> To make an arrest in a criminal action, the officer may break down any outer or inner door, or windows or a dwelling house, or any other enclosure, if, after notice of his office and purpose, he is refused admittance.

Our courts have extended the requirement of RCW10.31.040 to police officers who are executing a search warrant. *State v. Myers*, 102 Wn.2d 548, 552, 689 P.2d 38 (1984).

To comply with the "knock and announce" rule, police must, prior to a non-consensual entry: 1) announce their identity; 2) demand admittance; 3) announce the purpose of their demand; and 4) be explicitly or implicitly denied admittance. *State v. Coyle*, 95 Wn.2d 1, 5, 621 P.2d 1256 (1980). It was undisputed in this case and the trial court found that the officers did not follow this required procedure in forcibly entering Wilson's motel room. The trial court nevertheless upheld the search of Wilson's motel room by finding that exigent circumstances existed which justified the officers' immediate entry into the room and non-compliance with the "knock and announce" rule. CP 128. Specifically, the trial court found that "the officers had a genuine and articulable concern for their welfare based upon the assault by the defendant, threats made by the defendant to shoot the police dog, and the nature of the prior burglaries." CP at 128.

Wilson submits that the court did not have a basis to find that exigent circumstances existed in his case.

To prove that exigent circumstances are present in a "knock and announce" situation, the State must be able to point to specific, articulable

facts and the reasonable inferences therefrom that justify the intrusion. *Coyle*, 95 Wn.2d at 9. This requirement must generally be satisfied in either of two ways.

> (1) police have specific prior information that a suspect has resolved to act in a manner which would create an exigency, or he has made specific preparations to act in such a manner; or
>
> (2) Police are confronted with some sort of contemporaneous sound or activity alerting them to the possible presence of an exigent circumstance.

In this case, the trial court relied in large part upon the allegations by law enforcement that they had received "intelligence" that Wilson had threatened to shoot police if they tried to apprehend him and "a strong belief" that Wilson may be armed and "may take aggressive action towards us." Pretrial RP at 48. Wilson was alleged to have hit Fritts at the Leonard Road trailer on April 13 and threatened to shoot Gizmo. Pretrial RP at 48.

The police did not identify the source of their "intelligence" that he had threatened to shoot police and that he may be armed. Police alleged that he had taken guns from the Gow road, but the State acknowledged that those weapons were recovered within a half hour at the Leonard Road trailer. Pretrial RP at 57. Fritts did not testify that he observed a weapon on the man he tried to arrest at Leonard Road. Police did not recover any weapons

from the Cranberry Motel at the time of Wilson's arrest or when the police returned to search the room with a warrant. Pretrial RP 49.

In addition, any evidence seized from the motel room and the Caprice upon execution of the warrant should have been suppressed as the fruit of the illegal search of the room. *State v. Aydelotte*, 35 Wn. App. 125, 131, 665 P.2d 443 (1983); *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441(1963).

Under *Aydelott* and *Wong Sun, supra,* the fruits of the search of the motel room and Caprice should therefore have been suppressed as well.

2. THE POLICE SEIZURE OF EVIDENCE FROM THE TOYOTA CELICA AND TRAILER AT 35 LEONARD ROAD VIOLATED ARTICLE I, § 7 OF THE STATE CONSTITUTION.

c. Motion to suppress (October 11, 2006).

Police obtained a warrant to search Rowe's trailer and the Toyota Celica on April 13. On the second day of trial, Wilson moved to suppress evidence obtained from the Toyota Celica and the trailer. 3RP at 32-33.

The trial ruled that the motion was untimely and did not hear the motion, ruling that he had waived the issue. The court cited *State v. Radke*, 120 Wn. App. 43, 83 P.3d 1038 (2004) and *State v. Robbins*, 37 Wn.2d 431, 432, 224 P.2d 345 (1950) in support of its ruling. 3RP at 163-64.

d. Motion for Arrest of Judgment (October 30, 2006).

Wilson filed a Motion to Arrest Judgment on October 23, again arguing that evidence obtained from the Celica and trailer at Leonard Road should be suppressed.

i. Wilson had automatic standing under Article 1, § 7 of the Washington Constitution to challenge the search of the dumpster.

Although a criminal defendant challenging a violation of his Fourth Amendment rights traditionally must first show standing to raise the claim by demonstrating a violation of his personal privacy rights, the United States Supreme Court has created an exception to this rule, adopting an automatic standing rule, applicable where the defendant is charged with a possessory crime and the item allegedly possessed was discovered through police intrusion into the privacy interests of another. *Jones v. United States*, 362 U.S. 257, 80 S. Ct. 725, 4 L. Ed. 2d 697, 78 A. L. R. 2d 233 (1960). Although the United States Supreme Court has since abolished automatic standing under the Fourth Amendment, the Washington Courts continue to adhere to the automatic standing rule as part of the protections guaranteed by the State Constitution. *State v. Simpson*, 95 Wn.2d 170, 181, 622 P.2d 1199

(1980). In *State v. Carter*, the Washington Supreme Court continued to follow the automatic standing doctrine, declining to overrule *Simpson*. *State v. Carter*, 127 Wn.2d 836, 850, 904 P.2d 290 (1995). The automatic standing rule in Washington was again affirmed in *State v. Williams*, 142 Wn.2d 17, 22, 11 P.3d 714 (2000).

For a defendant to have automatic standing to challenge a search or seizure, he must two requirements:

1. The offense charged must involve possession as an essential element of the offense, and

2. The defendant must be in possession of the contraband at the time of the contested search or seizure.

State v. Zakel, 119 Wn.2d 563, 568, 834 P.2d 1046 (1992); *State v. Michaels*, 60 Wn.2d 638, 644-47, 374 P.2d 989 (1962). Further, there must be a direct relationship "between the challenged police action and the evidence used against the defendant." *State v. Jones*, 146 Wn.2d 328, 334, 45 P.3d 1062 (2002).

In the instant case, Wilson was charged with possession of a stolen firearm. CP 13-15. Thus, Wilson meets the first requirement for automatic standing, since possession is an essential element of the offense of possession of a stolen firearm. See, e.g., *State v. Thomas*, 150 Wn.2d 821, 875, 83 P.3d 970 (2004). Second, Wilson was alleged to have possessed the firearms

found by police in Rowe's trailer. The State alleged that Wilson took the firearms in the course of a burglary at Gow's house, transported the weapons to Rowe's trailer, and brought them into the residence. A witness testified that police arrived shortly after he brought the guns into the trailer. Fritts testified that Wilson walked out of the trailer shortly after he arrived at the scene. The testimony presented by the State at trial places the firearms in Wilson's possession within seconds or minutes of Fritts' arrival at the trailer.

Even if this Court interprets automatic standing to require physical possession at the time of the execution of the warrant, the testimony supports an inference that Wilson constructively possessed the weapons at the time of the contested search. Constructive possession falls within the possession requirement for automatic standing. *State v. Kypreos*, 115 Wn. App. 207, 212-13, 61 P.3d 352 (2002) (citing *State v. Jones*, 146 Wn.2d at 333; *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1960)). Wilson therefore also meets the second requirement.

In addition it has also been stated that under Washington's automatic standing rule, a defendant has standing to claim the constitutional protection from unreasonable searches and seizures if he was legitimately on premises where a search occurred and if the fruits of the search are proposed to be used against him. *State v. Michaels*, 60 Wn.2d at 644-47; *State v. Chelly*, 94 Wn.

App. 254, 258, 970 P.2d 396 (1999). Wilson's offense and the search of the trailer meets the latter aspect of this expression of the automatic standing rule as argued *supra*.

Wilson's charge in count 2 and the circumstances of the police search of the trailer meet all the technical requirements for the assertion of automatic standing.

i. The trial court erred in denying Wilson's motion to suppress evidence seized during a search of the trailer and car because the search was invalid under *Franks v. Delaware*.

On cross examination, Det. Kolilis acknowledged the statement that Gow witnessed the Celica leave the house and that the car had license plate number 132 MBL, which was contained in a declaration in support of a warrant to search the trailer and Celica, was wrong. 2RP at 114, 115.

He stated that it was Chris Cain, not Gow, who had seen the car leaving Gow's house, and that the license plate was not seen by either Gow or Cain. 2RP at 115.

The police searched the car and the trailer where the car was parked on April 13. Evidence from the Gow burglary was found in the Celica and the trailer.

The issue of what vehicle Cain specifically saw was a critical issue in determining whether there was probable cause to issue a warrant to search the trailer and car. Cain's statement to police was that he saw a blue Toyota Celica with a spoiler and pop up lights. He did not see the driver and he did not see the car's license plates. Fritts found a car matching the description given by Cain at 35 Leonard Road.

A witness said that Wilson arrived at Leonard Road in the Celica. Another witness said that she gave the car to Wilson but that the car was not registered to Wilson. The witnesses who were present at the Leonard Road said nothing about Wilson being present at the Gow residence. The license plate number, wrongly attributed to Gow, was a critical link between the Gow burglary, the Toyota, and the Leonard Road trailer. The link, however, was provided by police *only after* the suspect vehicle was found at Leonard Road. This information provided a crucial link between the scene of the alleged offense at Gow's house and the Leonard Road trailer—a link that did not exist in the testimony of the witness at the Gow house.

At the hearing on October 30, the trial court erred in finding that "the gist of the whole story was basically correct . . . ." 3RP at 256. Rather than evaluate the significance of having police supply a compelling link between Gow's house and the Leonard Road trailer, Judge McCauley instead

speculated that the erroneous information was the result of information "being conveyed by telephone in a quick fashion to try to pull together the information for the search warrant" and that "inaccuracies turned upon the affidavit of the prosecutor." 3RP at 256.

When the defendant makes a preliminary showing that the affiant knowingly and intentionally, or with a reckless disregard for the truth, either included a material false statement or omitted a material statement in the application for the search warrant, the defendant is entitled under the Fourth Amendment to a hearing to substantiate his claim of falsity. *Franks v. Delaware*, 438 U.S. 154, 155-156, 57 L.Ed.2d 667, 98 S.Ct 2674 (1978); *State v. Thetford*, 109 Wn.2d 392, 745 P.2d 496 (1987). If, at the *Franks* hearing, the defendant established both materiality and intentionality, or recklessness, he or she is entitled to suppression. *State v. Garrison,* 118 Wn.2d 870, 873, 827 P.2d 1388 (1992). "Facts must be deemed material . . . if, because of their inherent probative force, there is a substantial possibility they would have altered a reasonable magistrate's probable cause determination." *People v. Kirkland*, 28 Cal.3d 376, 169 Cal.Rptr. 667, 618 P.2d 213 (1980) (quoted in LAFAVE, *Search and Seizure*, § 4.4(b)(1987)).

While materiality alone does not generally establish that a false statement or omission was intentional, *State v. Garrison*, as the court noted in

State v. Gonzales, 77 Wn. App. 479, 482 n.1, 891 P.2d 743 *rev. denied*, 127 Wn2d 1008 (1995), "there must come a point when an appellate court can say as a matter of law that no reasonable finder of fact could fail to find deliberated conduct" given the materiality of the misstatement or omission.

Recklessness may be shown "where the affiant 'in fact entertained serious doubts as to the truth' of facts or statements in the affidavit." *State v. O'Connor,* 39 Wn. App. 113, 117, 692 P.2d 208, *rev. denied*, 103 Wn.2d 1022 (1984) (quoting *St. Amant v. Thompson*, 390 U.S. 727, 731, 20 L.Ed.2d 262, 88 S.Ct 1323 (1968)); *United States v. Johnson*, 78 F.3d 1258, *cert. denied*, 117 S.Ct 227 (8th Cir. 1996). "Serious doubts" may be shown by "the existence of obvious reasons to doubt the veracity of the informant or the accuracy of his reports." *State v. Clark*, 68 Wn. App. 592-600-601, 844 P.2d 1029 (1993).

At the *Franks* hearing, the remedy for a material misstatement included in the affidavit is to "excise the offending language and if the remaining information does not show probable cause, the evidence must be suppressed." *Kinder v. Mangan*, 57 Wn. App. 840, 846, 790 P.2d 652 (1990) (citing *State v. Stephens*, 37 Wn. App. 76, 79, 678 P.2d 832, *rev. denied*, 101 Wn.2d 1025 (1984)); *United States v. Mendosa,* 989 F.2d 366, 369 (9th Cir. 1993).

Here, the court failed to even consider the impact of the false statement that the license plate was observed by a witness at Gow's residence.

Under the authority of *Franks v. Delaware*, the trial court erred in denying Wilson's motion to suppress the evidence seized during the search of the trailer and the Celica.

iii. The trial court's failure to order a *Franks* hearing after the defense met its burden of proving material falsehood in the search warrant affidavit violated Wilson's right to privacy under Washington Constitution Article I, § 7 and United States Constitution, Fourth Amendment.

Ordinarily a judge reviewing a challenged search warrant may only consider those matters that were presented to the magistrate who issued the warrant, that is, the information contained within the "four corners" of the search warrant affidavit. *United States v. Damitz*, 495 F.2d 50 (9th Cir. 1974). However, the reviewing court must examine matters outside of the affidavit at an evidentiary hearing when the defendant makes a preliminary showing that the affiant knowingly and intentionally or with reckless disregard for the truth included false statements necessary to the finding of probable cause or if the affiant with the same mental state omitted material facts. *State v.*

Garrison, 118 Wn.2d 870, 827 P.2d 1388 (1992); *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).

Such omissions or false statements are fatal to a search warrant. As this Court has succinctly put it: "An omission or incorrect statement made in support of a search warrant may invalidate the warrant if it was (1) material, and (2) made deliberately or with reckless disregard for the truth." *State v. Herzog*, 73 Wn. App. 34, 54, 867 P.2d 648 (1994). The defendant, in his or her preliminary showing, must allege that the affiant acted deliberately or with reckless disregard for the truth. *Garrison*, 118 Wn.2d at 872.

As noted *supra*, once a defendant makes the required preliminary showing, the reviewing court must then insert the omitted matters into the affidavit for the warrant or excise from the affidavit the false statements. *Garrison*, 118 Wn.2d at 873; *State v. Jones*, 55 Wn. App. 343, 345, 777 P.2d 1053 (1989); *see State v. Stephens*, 37 Wn. App. 76, 69, 678 P.2d 382 (1984). If the affidavit, as supplemented or redacted, is insufficient to allow a finding of probable cause, then the defendant is entitled to an evidentiary hearing on whether the material was omitted deliberately or recklessly. *Garrison*, 118 Wn.2d at 873; *see State v. Frye*, 26 Wn. App. 276, 279, 613 P.2d 152 (1980). If after such a hearing, the reviewing court determines that the material was deliberately or recklessly omitted or included and further

determines that the omitted material (or falsely included material) was necessary to a probable cause finding, then the warrant is invalid and all fruits from it must be suppressed. *Herzog*, 73 Wn. App. at 54; *Jones*, 55 Wn. App. at 345; *see Stephens*, 37 Wn. App. at 79; *Garrison*, 118 Wn.2d at 872-874.

In this case, the evidence given in support of the motion for suppression makes the required preliminary showing that false material facts were inserted into the affidavit. It is clear that the "double error" of not only asserting that the license plate was seen at Gow's house, but attributing it to Gow himself, constitutes reckless disregard for the truth. Rather than address the significance of the information, the trial court instead essentially acted as an apologist for the State, finding that although there were mistakes in the declaration, the State was working in "a quick fashion" and any mistakes were not the result of intentional or malicious statements. The trial court utterly failed to address whether the false information was done recklessly, and in fact the court's finding that the State was working "quickly" supports Wilson's' contention that mistake was in fact made recklessly.

Here, the false inclusions subverted a fair determination of probable cause. Thus, in the case at bar, the trial court erred when it failed to hold an evidentiary hearing to determine whether the officer providing the information to Vingo acted intentionally or recklessly, or whether Vingo

herself acted intentionally or recklessly.

3. THE TRIAL COURT ERRED IN DENYING THE DEFENSE MOTION TO SEVER THE BURGLARY CHARGE FROM THE OTHER COUNTS.

Wilson moved the trial court to sever counts 1, 2, and 3 from counts 4, 5, and 6. CP at 35-39.

Offenses that are of the same or similar character may be joined in one charging document. CrR 4.3(a)(1).

CrR 4.3(a) provides:

> (a) Joinder of Offenses. Two or more offenses may be joined in one charging document, with each offense stated in a separate count, when the offenses, whether felonies or misdemeanors or both:
>
> (1) Are of the same or similar character, even if not part of a single scheme or plan; or
>
> (2) Are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan.

The court, however, must sever offenses where "severance will promote a fair determination of the defendant's guilt or innocence of each offense." CrR 4.4(b).

CrR 4.4(b) provides:

> (b) Severance of Offenses. The court, on application of the

> prosecuting attorney, or on application of the defendant other than under section (a), shall grant a severance of offenses whenever before trial or during trial with consent of the defendant, the court determines that severance will promote a fair determination of the defendant's guilt or innocence of each offense.

Washington courts have recognized that joinder is inherently prejudicial. *State v. Ramirez*, 46 Wn. App. 223, 226, 730 P.2d 98 (1986). A defendant may be prejudiced by joinder in a number of ways:

> (2) he may become embarrassed or confounded in presenting separate defenses; (2) the jury may use the evidence of one of the crimes charged to infer a criminal disposition on the part of the defendant from which is found his guilt of other crimes charged; or (3) the jury may cumulate the evidence of the various crimes charged and find guilt when, if considered separately, it would not so find. A less tangible, but perhaps equally persuasive, element of prejudice may reside in a latent feeling of hostility engendered by the charging of several crimes as distinct from only one.

State v. Harris, 36 Wn. App. 746, 750, 677 P.2d 202 (1984) (citations omitted)). Washington courts, however, have found factors that mitigate this inherent prejudice:

> (1) The strength of the State's evidence on each count, (2) clarity of defenses to each count, (3) the court properly instructs the jury to consider the evidence of the crime, and (4) the admissibility of the evidence of the other crimes even if they had been tried separately or never charged or joined.

Harris, 36 Wn. App. at 750 (citing *State v. Smith*, 774 Wn.2d 744,

446 P.2d 571 (1968), *vacated in part*, 408 U.S. 934 (1972)) (emphasis in original).

Where an accused demonstrates that the manifest prejudice of joinder outweighs concerns for judicial economy, severance should be granted. *State v. McDonald*, 122 Wn. App. 804, 814-15, 95 P.3d 1248 (2004) (citing *State v. Bythrow,* 114 Wn.2d 713, 718, 790 P.2d 154 (1900). The propriety of joinder is a question of law, reviewed de novo. *State v. Bryant*, 89 Wn. App. 857, 864, 950 P.2d 1004 (1998), *rev. denied*, 137 Wn.2d 1017 (1999); *see also Harris*, 36 Wn. App. At 749-50 (denial of a motion to sever offenses when such severance should be granted is an abuse of discretion).

a. Severance is Proper in a Case Where the Multiplicity of Charges Invited the Jury to Cumulate the Evidence and Infer a Criminal Disposition.

In this case, there is great danger that the jury may have used the evidence of one of the crimes charged to infer a criminal disposition to find Wilson guilty of the other crimes charged. There is also great danger that the jury may have cumulated the evidence of the various crimes to find guilt. At the very least, trying so many charges together necessarily engendered a latent feeling of hostility toward Wilson and the feeling that he was out of control and perpetrated a crime spree. Those factors that may mitigate the prejudicial

effect are not sufficient in this case.

i. The Strength of the State's Evidence For the Gow Burglary (Count 1) was Unequal with Possession of Stolen Property and Possession of Methamphetamine (Counts 5 and 6).

A witness, Chris Cain, testified that he saw a blue Toyota Celica leave Gow's house. Law enforcement went to a trailer at 35 Leonard Road and found Wilson there; a blue Toyota Celica was parked at the trailer. Guns that were missing from the Gow house were found in the trailer. A witness said that she saw him carry the guns into the house. Items from Gow's house were found in the Celica. No eyewitness, however, placed Wilson at the Gow residence, and no forensic evidence was obtained from the scene.

On the other hand, Wilson was found to be in possession of credit cards and methamphetamine at the Cranberry Motel on April 18. Thus, the strength of the evidence on the Gow burglary, when compared to the charges in counts 5 and 6, vary considerably.

ii. Because Evidence of the Two Incidents of April 13 Were Not Cross-Admissible to the arrest at the Cranberry Motel on April 18, Severance Was Appropriate.

If evidence of the other offense could not be admitted under ER

404(b) in separate trials for each offense, there is a strong likelihood of prejudice from the denial of severance. *Harris*, 36 Wn. App. 746. The true test of admissibility in this regard is "whether the other crimes evidence is relevant and necessary to prove an essential ingredient of the crime charged." *State v. Weddel*, 29 Wn. App. 461, 466, 629 P.2d *review denied*, 96 Wn.2d 1009 (1981).

b. Motive.

State v. Tharp, 96 Wn.2d 591, 597, 637 P.2d 961 (1981) (quoting *Black's Law Dictionary*, (Rev. 4th Ed. 1968)). "The prior wrongful acts must establish a motive to commit the crime charged, not simply a propensity to engage in criminal activity." *United States v. Brown*, 880, F.l2d 1012, 1015 (9th Cir. 1989) (observing that where motive is not an element of the offense, evidence admitted under the "motive" exception must be relevant to establish an element of the offense that is a material issue.). In Wilson's case there is no logical explanation for why the burglary alleged to have occurred on April 13 relates to a motive to commit the alleged possession of stolen property and possession of methamphetamine, alleged to have occurred on April 18.

c. Intent.

As the court held in *State v. Wade*, 98 Wn. App. 328, 334-35, 989

P.2d 576 (1999), "[w]hen the State offers evidence of prior acts to demonstrated intent, there must be a logical theory, other than propensity, demonstrating how the prior acts connect to the intent required to commit the offense." The only way in which the burglary charge is relevant to the intent in the robbery is the inference that if Wilson burglarized Gow's house and took items before, he was likely to possession stolen items. Under *Wade*, this is precisely the type of propensity evidence that is inadmissible under ER 404(b).

d. Common Scheme or Plan.

For evidence of the charges in this case to be considered part of a common scheme, the conduct associated with each charge must bear "such similarity in significant respects" to all of the other charges that "the similarity is not merely coincidental, but indicates that the conduct was directed by design." *State v. Lough,* 125 Wn.2d 847, 860, 889 P.2d 487 (1995). The question is whether these facts represent more similarity in results or whether they exhibit sufficient commonality that they naturally form a common plan. *Lough,* 125 Wn.2d at 860. In Wilson's case, the alleged burglary, possession of weapons and assault were entirely different from the offenses alleged to have occurred in counts 4, 5, and 6. The offenses in counts 5 and 6 share neither similarity in result nor commonality

in purpose with the offense in alleged in counts 1, 2, and 3.

Therefore, because the testimony was not cross-admissible to show motive, intent, or common scheme or plan, the trial court erred when it denied Wilson's motion to sever the burglary charge in count 1 from 4, 5, and 6.[4]

4. CUMULATIVE ERROR DENIED WILSON A FAIR TRIAL.

The combined effects of error may require a new trial, even when those errors individually might not require reversal. *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); *United States v. Preciado-Cordobas*, 981

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[4] CrR 4.4 requires a defendant to renew a pretrial motion for severance, which has been overruled, "before or at the close of all the evidence." Failure to renew the motion waives severance. CrR 4.4(a)(1)-(2).

CrR 4.4(a) provides:

(a) Timeliness of Motion – Waiver.(1) A defendant's motion for severance of offenses or defendants must be made before trial, except that a motion for severance may be made before or at the close of all the evidence if the interests of justice require. Severance is waived if the motion is not made at the appropriate time.

(2) If a defendant's pretrial motion for severance was overruled he may renew the motion on the same ground before or at the close of all the evidence. Severance is waived by failure to renew the motion.

Applying this rule, this Court has found that where a defendant initially brings a motion to sever at arraignment and the issue is referred to the trial court, and where a severance motion is denied by the trial court but not renewed later in the trial, the severance issue is waived on appeal. *See, State v. Henderson*, 48 Wn. App. 543, 545, 551, 740 P.2d 329; *rev. denied*, 109 Wn.2d 1008 (1987).

Wilson noted a *pro se* motion to sever the charges on August 22, 2006. The court denied the motion to sever on September 28, 2006. Pretrial RP at 64. Trial started on October 10, 2006. The record does not indicate that Wilson renewed this motion during the trial.

F.2d 1206, 1215 n.8 (11th Cir. 1993). Reversal is required where the cumulative effect of several errors is so prejudicial as to deny the Appellant a fair trial. *Mak v. Blodgett*, 970 F.2d 614 (9th Cir. 1992); *United States v. Pearson*, 746 F.2d 789, 796 (11th Cir. 1984). In this case, the cumulative effect of the trial courts errors, in conjunction with the instances of ineffective assistance cited *supra* produced an unmistakable series of errors that prejudiced the Appellant and materially affected the outcome of the trial.

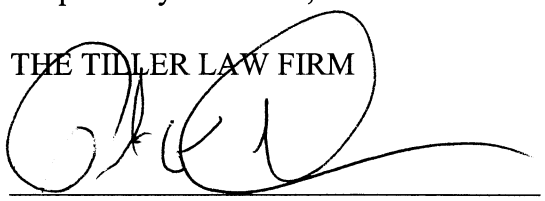
E. CONCLUSION

For the foregoing reasons, Rodney Wilson respectfully requests that this Court reverse his convictions and remand this matter for a new, fair trial. In the unlikely event that he does not prevail, he asks this Court to deny any State request for costs on appeal.

DATED: August 24, 2007.

Respectfully submitted,

THE TILLER LAW FIRM



PETER B. TILLER - WSBA 20835
Of Attorneys for Rodney Wilson

A

SUPERIOR COURT OF WASHINGTON FOR GRAYS HARBOR COUNTY

STATE OF WASHINGTON, Plaintiff, v. RODNEY A. WILSON, Defendant.	No.: 06-1-257-4 **FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER** **RE: MOTION TO SUPPRESS**

THIS MATTER having come on before the undersigned judge of the above-entitled court, the defendant appearing in person and with his attorney, William Morgan, the State appearing through Gerald R. Fuller, Chief Criminal Deputy Grays Harbor County prosecuting attorney, and the Court having heard testimony enters the following:

FINDINGS OF FACT

1.

On April 13, 2006, there was a burglary of the Gow residence located at 8 Riverview Drive, Humptulips. Numerous firearms were stolen. The witness gave a vehicle description for the suspect vehicle as a blue 1980's Toyota Celica with a spoiler and flip-up headlights.

2.

Deputy Fritts of the Grays Harbor County Sheriff's Department received information of the burglary. He also thought he recognized the motor vehicle as described. Fritts went to 35 Leonard Road where he located a vehicle matching that description.

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3.

Fritts observed the defendant come out of the trailer on the premises and walk toward the blue vehicle. Fritts called to the defendant and then contacted him. The defendant was told that he was going to be handcuffed and detained for investigative purposes. The defendant swung around, struck Fritts in the face and then fled on foot.

4.

Deputy Crawford arrived shortly thereafter with his tracking dog. Crawford tracked the defendant into the woods near the residence. At one point, Crawford called to the defendant telling him to surrender or that he would send the dog after him. The defendant called back "Send the dog and I'll f---ing shoot him". The defendant then fled and was not captured that day.

5.

On April 17, 2006, Deputy Schrader received preliminary information that the defendant was in the Westport area. On the morning of the April 18th, he confirmed with the landlord of the Cranberry Motel that the defendant was staying in Unit No. 21 of the Cranberry Motel. The defendant was identified by photograph shown to the landlord.

6.

The landlord informed Schrader that he had seen the defendant driving a white Chevrolet Caprice that was parked in front of Unit No. 21. Deputies were informed of a burglary that occurred at the Clark residence that had been reported on April 18, 2006. Among the items taken was a Caprice motor vehicle. Officers ran the license plate on the vehicle parked in front of Unit No. 21. The registered owner was found to be the victim of the burglary.

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7.

The officers obtained a pass key from the landlord. Three officers went to the front door, two went to the rear window. Officers went to the door and unlocked it. Simultaneously, as they opened the door, they announced "police". The defendant was found at the door and placed under arrest. He and another individual inside, Tina Arington, were taken out of the room. The room was later secured for later search with a warrant.

8.

The defendant was searched incident to arrest. Drug paraphernalia and drugs were seized from his person. Also seized was a credit card belonging to Joanne Clark, the victim of the reported burglary.

Based upon the foregoing findings of fact, the court enters the following:

CONCLUSIONS OF LAW

1.

The court has jurisdiction over the parties and subject matter herein.

2.

Exigent circumstances warranted the waiver of the requirements of RCW 10.31.040 in that the officers had a genuine and articulable concern for their welfare based upon the assault by the defendant, threats made by the defendant to shoot the police dog, and the nature of the prior burglaries. The concerns of the officers were reasonable and well founded.

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ORDER

IT IS THEREFORE ORDERED that the motion to suppress is denied.

DATED this 2 day of ~~September~~ Oct, 2006

JUDGE

Presented by:

GERALD R. FULLER
Chief Criminal Deputy
WSBA #5243

Approved (for entry)(as to form):

WILLIAM E. MORGAN
Attorney for Defendant
WSBA #4529

GRF/jfa

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IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent, v. RODNEY A. WILSON, Appellant.	COURT OF APPEALS NO. 35621-0-II CORRECTED CERTIFICATE OF MAILING

The undersigned attorney for the Appellant hereby certifies that the original Appellant's Opening Brief was mailed by first class mail to the Court of Appeals, Division 2, on August 24, 2007, and copies were mailed to the Court of Appeals, Division Two, Rodney A. Wilson, Appellant, and Gerald R. Fuller, Grays Harbor County Deputy Prosecuting Attorney, by first class mail, postage pre-paid on Monday, August 27, 2007, at the Centralia, Washington post office addressed as follows:

Mr. Gerald R. Fuller
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102 W. Broadway, Room 102
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IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent, v. RODNEY A. WILSON, Appellant.	COURT OF APPEALS NO. 35621-0-II CERTIFICATE OF MAILING

The undersigned attorney for the Appellant hereby certifies that the original and one copy of Appellant's Opening Brief were mailed by first class mail to the Court of Appeals, Division 2, and copies were mailed to Rodney A. Wilson, Appellant, and Gerald R. Fuller, Grays Harbor County Deputy Prosecuting Attorney, by first class mail, postage pre-paid on Friday, August 24, 2007, at the Centralia, Washington post office addressed as follows:

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